16 Am. Jur. 2d Constitutional Law § 81

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Constitutional Law

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IV. Construction of Constitutions

C. Effect of Extrinsic Sources

1. In General

§ 81. Use of extrinsic sources in construction of constitutional provision, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 603

When the language of a constitutional provision is unambiguous, resort to extrinsic evidence is prohibited,[1] but if the language is ambiguous, the court considers extrinsic evidence of the enacting body's intent.[2] In other words, to the extent a constitutional provision is ambiguous, extrinsic aids may be examined to determine the intent of the framers and the people adopting the proposed amendment.[3] In construing a constitutional provision, the court properly consults extrinsic sources, including the proceedings of constitutional conventions and any legislation related to the constitutional provision that was enacted at or near the time of the adoption of the constitutional amendment.[4]

Extrinsic sources are also considered in the construction of a constitutional provision where extrinsic aids clearly manifest an intent not apparent from the express language.[5]

Observation:

The fact that a constitutional provision does not explicitly set forth every specific action that is prohibited does not mean that such a provision is ambiguous so as to permit resort to extrinsic evidence in construing the provision.[6]

The examination of a variety of legal and other sources to determine the public understanding of a legal text in the period after its enactment or ratification is a critical tool of constitutional interpretation.[7]

Footnotes

1 National Pride At Work, Inc. v. Governor of Michigan, 481 Mich. 56, 748 N.W.2d 524 (2008).

2 Heath v. Kiger, 217 Ariz. 492, 176 P.3d 690 (2008).
If the language of a provision of a state constitution is less than plain and admits of ambiguity, the courts may resort to extratextual factors, including the likely adverse consequences of a particular construction. Johnson v. Tenth Judicial Dist. Court of Appeals at Waco, 280 S.W.3d 866 (Tex. Crim. App. 2008).

3 Morita v. Gorak, 145 Haw. 385, 453 P.3d 205 (2019).
When interpreting constitutional provisions and amendments, court looks to intrinsic as well as extrinsic sources. State v. Kerr, 2018 WI 87, 383 Wis. 2d 306, 913 N.W.2d 787 (2018), cert. denied, 139 S. Ct. 848, 202 L. Ed. 2d 615 (2019).

4 Estate of Deeble v. Rhode Island Dept. of Transp., 134 A.3d 183 (R.I. 2016).

5 Espinoza v. Montana Department of Revenue, 2018 MT 306, 393 Mont. 446, 435 P.3d 603, 363 Ed. Law Rep. 850 (2018), cert. granted, 139 S. Ct. 2777, 204 L. Ed. 2d 1157 (2019).

6 National Pride At Work, Inc. v. Governor of Michigan, 481 Mich. 56, 748 N.W.2d 524 (2008).

7 District of Columbia v. Heller, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008).

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IV. Construction of Constitutions

C. Effect of Extrinsic Sources

1. In General

§ 82. Effect of titles, headings, and the like in construction of constitutional provisions

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 603

While the subject matter of an article of a constitution need not be limited to the subject expressed in the title of the article, the provisions should be presumed to relate to the subject matter as expressed in the title unless the context indicates the contrary.[1] A title is not generally required on a proposed constitutional amendment, but if one exists, it may be resorted to as an aid to construction of the amendment by the court,[2] especially where the amendment is ambiguous.[3]

Resort might also be had to the title of an initiative measure submitted to the electors of the state for their approval and prepared at the instance of the proponents thereof.[4] In construing a constitutional amendment that was approved by the electorate, the ballot title is a contemporaneous construction of the constitutional amendment and weighs heavily in determining its meaning.[5] The understanding of the legislature as the framers and of the electorate as the adopters of a constitutional amendment is the best guide for determining an amendment's meaning and scope, and such understanding is reflected in the language used in the measure and the ballot title.[6] When interpreting the text of a referred constitutional amendment, the history courts will consider includes sources of information that were available to the voters at the time the measure was adopted and that disclose the public's understanding of the measure, such as the ballot title, arguments included in the voters' pamphlet, and contemporaneous news reports and editorials.[7]

Subheadings within a constitution may be relevant in ascertaining the intent or purpose of a provision.[8] However, the division of a constitution into articles, chapters, and sections is a mere matter of convenience for the purpose of reference and is not of significance in applying the rules of construction and interpretation.[9]

Footnotes

1 Hall v. Essner, 208 Ind. 99, 193 N.E. 86 (1934).
Organization of the Missouri Constitution into separate articles creates a presumption that matters pertaining to the subjects therein described should be set forth in the article applicable to that subject and not commingled under unrelated headings; organizational headings of that Constitution are strong evidence of what those who drafted and adopted it meant by one subject. Missourians to Protect the Initiative Process v. Blunt, 799 S.W.2d 824 (Mo. 1990).

2 Collier v. Gray, 116 Fla. 845, 157 So. 40 (1934); Haile v. Foote, 90 Idaho 261, 409 P.2d 409 (1965).

3 Miller v. Leathers, 311 Ark. 372, 843 S.W.2d 850 (1992).

4 Sandelin v. Collins, 1 Cal. 2d 147, 33 P.2d 1009, 93 A.L.R. 956 (1934).

5 Fent v. Fallin, 2014 OK 105, 345 P.3d 1113 (Okla. 2014).

6 Gentges v. State Election Board, 2018 OK 39, 419 P.3d 224 (Okla. 2018).

7 AAA Oregon/Idaho Auto Source, LLC v. State by and through Department of Revenue, 363 Or. 411, 423 P.3d 71 (2018).

8 Kadan v. Board of Sup'rs of Elections of Baltimore County, 273 Md. 406, 329 A.2d 702 (1974).

9 State v. Moody, 71 Mont. 473, 230 P. 575 (1924).
The title conferred on a constitutional provision by the reviser of statutes is not entitled to deference. StopAquila.org v. City of Peculiar, 208 S.W.3d 895 (Mo. 2006).

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IV. Construction of Constitutions

C. Effect of Extrinsic Sources

1. In General

§ 83. Judicial construction of constitutional provisions; economic and social science data

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 603, 610

When determining the intent of the framers of a constitution, a court looks to relevant precedent that has already interpreted the provision at issue.[1] For instance, when the court determines the meaning of a particular word or phrase in a constitutional provision or statute, the court considers the text in context, not in isolation; for context, the court may look to the broader context in which that text was enacted, including other law—constitutional, statutory, decisional, and common law alike—that forms the legal background of the constitutional provision.[2] When preenactment decisions of the supreme court interpreted the meaning of certain text that the framers of the state constitution subsequently chose to use, the text the framers chose had already been definitively interpreted, and when the framers considered language that had already been definitively interpreted and kept it without material alteration, they are strongly presumed to have kept with the text its definitive interpretation.[3] The supreme court construes the state constitution in accordance with settled principles of interpretation, which require it to examine the text of the provision in dispute in its historical context, along with relevant cases interpreting it.[4]

Sociological materials may be used by a court in construing a constitution,[5] and anthropological studies may be used in equal protection cases involving racial or sexual discrimination.[6]

Footnotes

1 State v. Schneider, 2008 MT 408, 347 Mont. 215, 197 P.3d 1020 (2008).

2 Elliott v. State, 305 Ga. 179, 824 S.E.2d 265 (2019).

3 Olevik v. State, 302 Ga. 228, 806 S.E.2d 505 (2017).

4 Wittemyer v. City of Portland, 361 Or. 854, 402 P.3d 702 (2017).

5 Petition of Twenty-Four Vermont Utilities, 159 Vt. 339, 618 A.2d 1295 (1992).

6 Brown v. Board of Ed. of Topeka, Shawnee County, Kan., 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873, 38 A.L.R.2d 1180 (1954), supplemented, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083, 71 Ohio L. Abs. 584 (1955).

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IV. Construction of Constitutions

C. Effect of Extrinsic Sources

2. Other Constitutions

§ 84. Construction of constitutional provisions based on earlier constitutions of same state

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 615

The clue to the real meaning of an ambiguous provision in a state constitution frequently may be found by reference to corresponding provisions of the constitution which preceded it.[1] Framers of a new constitution who adopt provisions contained in a former constitution to which a certain construction has been given are presumed as a general rule to have intended that these new provisions should have the meaning attributed to them under the earlier instrument.[2] The embodiment in a constitution of provisions found in previous constitutions without change of verbiage precludes a court from giving their language a meaning different from that ascribed to the previous constitutional provisions.[3] Similarly, the incorporation into the constitution, without change of language, of a statutory prohibition will not be construed as intended to change the scope and effect of the prohibition, especially where the prohibition relates to a matter of grave importance as to which there is much controversy.[4]

Because the meaning of a previous provision that has been readopted in a new state Constitution is generally the most important legal context for the meaning of that new provision, and because the supreme court accords each of those previous provisions their own original public meanings, the court generally presumes that a constitutional provision retained from a previous constitution without material change has retained the original public meaning that provision had at the time it first entered a Georgia Constitution, absent some indication to the contrary.[5] A constitutional clause that is readopted into a new constitution and that has received a consistent and definitive construction is presumed to carry the same meaning as that consistent construction; the presumption arising from a consistent and definitive construction, however, like most legal presumptions, may be rebutted.[6]

Conversely, a difference between the language of a provision in a revised state constitution and that of a similar provision in the preceding state constitution is viewed as indicative of a difference in purpose.[7] Also, a corollary to the general principle is that where a word in an amendment or reenactment of a constitution is omitted, the omission should be presumed to have been intentional.[8] However, a grant of enlarged power by a constitutional provision should not rest upon some doubtful implication arising from the omission of a previous express limitation, at least unless it appears that the omission and its significance were called to the attention of the people.[9]

The rules stated above are applicable to constitutions adopted in immediate succession.[10] Where words used in an earlier constitution are not found in the constitution which immediately succeeded it but in a later constitution, there is a lack of the continuity which uniformly exists where the general rules are applied, the point being that by reason of the lapse of time it cannot be logically claimed that the words were adopted from the earlier constitution any more than from some other source.[11]

Footnotes

1 In re Advisory Opinion to the Governor, 112 So. 2d 843 (Fla. 1959); Succession of Lauga, 624 So. 2d 1156 (La. 1993); Warburton v. Thomas, 136 N.H. 383, 616 A.2d 495 (1992).

2 Thompson v. Talmadge, 201 Ga. 867, 41 S.E.2d 883 (1947); State ex rel. Gladden v. Lonergan, 201 Or. 163, 269 P.2d 491 (1954).
The body enacting a constitutional amendment is presumed to have had in mind existing constitutional or statutory provisions and their judicial construction, touching the subject dealt with. State v. Carswell, 114 Ohio St. 3d 210, 2007-Ohio-3723, 871 N.E.2d 547 (2007).

3 In re Advisory Opinion to the Governor, 112 So. 2d 843 (Fla. 1959); Rathjen v. Reorganized School Dist. R-II of Shelby County, 365 Mo. 518, 284 S.W.2d 516 (1955); Buoneto v. Buoneto, 278 N.Y. 284, 16 N.E.2d 284 (1938).

4 People v. Richter's Jewelers, Inc., 291 N.Y. 161, 51 N.E.2d 690, 150 A.L.R. 560 (1943).

5 Elliott v. State, 305 Ga. 179, 824 S.E.2d 265 (2019).

6 Elliott v. State, 305 Ga. 179, 824 S.E.2d 265 (2019).

7 Cherey v. City of Long Beach, 282 N.Y. 382, 26 N.E.2d 945, 127 A.L.R. 1210 (1940).

8 State ex rel. Gladden v. Lonergan, 201 Or. 163, 269 P.2d 491 (1954).

9 Kuhn v. Curran, 294 N.Y. 207, 61 N.E.2d 513 (1945).

10 Rathjen v. Reorganized School Dist. R-II of Shelby County, 365 Mo. 518, 284 S.W.2d 516 (1955).

11 Rathjen v. Reorganized School Dist. R-II of Shelby County, 365 Mo. 518, 284 S.W.2d 516 (1955).

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IV. Construction of Constitutions

C. Effect of Extrinsic Sources

2. Other Constitutions

§ 85. Construction of constitutional provisions based on constitutions of other states

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 617

When analyzing the rights afforded by a state constitution, the state supreme court may consider well-reasoned and meaningful decisions made by courts of last resort in sister states with similar constitutional provisions.[1] although that they are not in themselves conclusive.[2] Decisions from the United States Supreme Court and the highest courts of sister states may be persuasive, but ultimately the state supreme court is charged with interpreting the state constitution and its distinct provisions.[3] However, where a state constitutional provision is unique, the decision of a court of that state is final on its meaning, and cases from other states are of no consequence whatever.[4]

Where a constitutional provision has actually been borrowed from another state after it has been construed by the court of last resort of that state, the general rule is that the construction is adopted with the provision.[5]

The presumption that a precedent construction was intended to be followed, like every other, may be rebutted, and if the true intention of the framers of the constitutional provision is shown to be otherwise, the presumption must fail.[6] On the other hand, where a constitutional provision appears to have been in force in several states before it was adopted, it seems that the assumption cannot properly be made that it was borrowed from any particular state, and accordingly, the rule that constitutional provisions from an older source carry with them their accepted construction can no longer be strictly applied.[7] Further, the rule as to adopted construction does not apply where the provision is construed, after the time of its adoption, by the state borrowing it,[8] or where the construction is adopted in the state originally possessing the constitutional provision after the provision has

already been adopted in the borrowing state.[9] The rule is also inapplicable where the context of the portion of the constitution in which the adopted language appears is materially different from that in which it originally appeared.[10]

Footnotes

1 Jensen ex rel. Jensen v. Cunningham, 2011 UT 17, 250 P.3d 465 (Utah 2011).
Although the South Dakota Supreme Court must address questions of state constitutional interpretation autonomously to develop a coherent body of South Dakota constitutional law, it can look to other states for guidance. Gilbert v. Flandreau Santee Sioux Tribe, 2006 SD 109, 725 N.W.2d 249 (S.D. 2006).

2 Cardiff v. Bismarck Public School Dist., 263 N.W.2d 105 (N.D. 1978).

3 North Dakota Legislative Assembly v. Burgum, 2018 ND 189, 916 N.W.2d 83 (N.D. 2018).

4 Yellowstone Pipe Line Co. v. State Bd. of Equalization, 138 Mont. 603, 358 P.2d 55 (1960).

5 Minnesota Baptist Convention v. Pillsbury Academy, 246 Minn. 46, 74 N.W.2d 286 (1955); Wimberly v. Deacon, 1943 OK 432, 195 Okla. 561, 144 P.2d 447 (1943); Travelers' Ins. Co. v. Marshall, 124 Tex. 45, 76 S.W.2d 1007, 96 A.L.R. 802 (1934); State v. Brown, 103 Vt. 312, 154 A. 579, 76 A.L.R. 1029 (1931).
A state supreme court imputes to the framers of the state constitution the contemporary understanding of and judicial construction given to the provision they adopted, particularly when they singled out another state's approach and copied it virtually verbatim into the state's constitution. Arizona Together v. Brewer, 214 Ariz. 118, 149 P.3d 742 (2007).

6 Nogues v. Douglass (Nougues v. Douglass), 7 Cal. 65, 1857 WL 649 (1857).

7 Voss v. Waterloo Water Co., 163 Ind. 69, 71 N.E. 208 (1904).

8 Powell v. Spackman, 7 Idaho 692, 65 P. 503 (1901) (overruled in part on other grounds by, Hawkins v. Winstead, 65 Idaho 12, 138 P.2d 972 (1943)).

9 Kaplan v. Independent School Dist. of Virginia, 171 Minn. 142, 214 N.W. 18, 57 A.L.R. 185 (1927); Keetch v. Cordner, 90 Utah 423, 62 P.2d 273, 108 A.L.R. 52 (1936).

10 Rathjen v. Reorganized School Dist. R-II of Shelby County, 365 Mo. 518, 284 S.W.2d 516 (1955).

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IV. Construction of Constitutions

C. Effect of Extrinsic Sources

3. Construction of Federal Constitution on State Court's Construction of State Constitution; as Binding

§ 86. Construction of Federal Constitution on state court's construction of state constitution as binding, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 617, 618

Although a provision of the constitution of a state may be similar to a provision of the Federal Constitution, a state court is not bound, in construing the state provision, to follow the federal construction of the corresponding federal provision[1] as in addition to the protections provided to a person by the Federal Constitution, a state constitution is a separate and independent source of protection for that state's citizens.[2] Although a state constitution provides equivalent protections or analytical frameworks as the U.S. Constitution in some instances, the state supreme court will nonetheless conduct an independent review to determine the separate and particular intent of the framers of the state constitution.[3] It is a state supreme court's responsibility to examine the state constitution independently of the Federal Constitution, and this duty exists even though its conclusions in a given case may not differ from those reached by the U.S. Supreme Court when it interprets the Federal Constitution.[4] The state supreme court is the final arbiter of the state constitution and may interpret state constitutional provisions more broadly than corresponding provisions of the Federal Constitution.[5] Moreover, questions of the construction of the state constitution are strictly matters for the highest court of the state; the construction of similar federal constitutional provisions, though persuasive authority, is not binding on the state's construction of its own constitution.[6]

An analysis of whether a provision of a state constitution should be given an interpretation independent from that given to a corresponding federal constitutional provision considers the six nonexclusive factors: (1) the textual language of the state constitution, (2) differences in the texts of parallel provisions of the Federal and State Constitutions, (3) state constitutional and common-law history, (4) preexisting state law, (5) structural differences between the Federal and State Constitutions, and

(6) matters of particular state or local concern.[7] In reviewing a claim under the state constitution, the state supreme court may diverge from federal precedent where the federal analysis is flawed, where there are structural differences between the state and federal governments, or because of distinctive state characteristics.[8] However, a state court will not cavalierly construe the state constitution more expansively than the Federal Constitution, nor will a state court reject a United States Supreme Court interpretation of the Federal Constitution merely because state court wants to bring about a different result.[9] Thus, while it is a significant undertaking for any state court to hold that a state constitution offers broader protection than similar federal provisions and while it is certainly not sufficient to reject a United States Supreme Court opinion on a comparable federal clause merely because one prefers the opposite result,[10] it has nevertheless been said that a state court is to be informed but untrammeled by the supreme court's reading of parallel provisions of the Federal Constitution.[11] A party may establish sound and articulable reasons that the state constitution provides greater protection than the Federal Constitution when it demonstrates that the state constitution contains unique language, not found in its federal counterpart, that dictates the state supreme court should recognize the enhanced protection.[12]

Footnotes

1 Wallace v. State, 905 N.E.2d 371 (Ind. 2009); Gilbert v. Flandreau Santee Sioux Tribe, 2006 SD 109, 725 N.W.2d 249 (S.D. 2006).

2 Fertig v. State, 2006 WY 148, 146 P.3d 492 (Wyo. 2006).

3 State v. Schneider, 2008 MT 408, 347 Mont. 215, 197 P.3d 1020 (2008).

4 State v. Johnson, 2007 WI 32, 299 Wis. 2d 675, 729 N.W.2d 182 (2007).
The state constitution demands the state supreme court independently analyze an issue that has been previously analyzed under the Federal Constitution considering the charter's uniqueness. Wright v. State, 108 N.E.3d 307 (Ind. 2018).

5 State v. Decosimo, 555 S.W.3d 494 (Tenn. 2018), cert. denied, 139 S. Ct. 817, 202 L. Ed. 2d 577 (2019).

6 Olevik v. State, 302 Ga. 228, 806 S.E.2d 505 (2017).

7 State v. Arlene's Flowers, Inc., 193 Wash. 2d 469, 441 P.3d 1203 (2019); Sheesley v. State, 2019 WY 32, 437 P.3d 830 (Wyo. 2019).

8 State v. Tapia, 2018-NMSC-017, 414 P.3d 332 (N.M. 2018).

9 City of Golden Valley v. Wiebesick, 899 N.W.2d 152 (Minn. 2017).

10 Women of State of Minn. by Doe v. Gomez, 542 N.W.2d 17 (Minn. 1995).

11 State v. Morales, 232 Conn. 707, 657 A.2d 585, 40 A.L.R.5th 845 (1995).

12 State v. Covington, 2012 MT 31, 364 Mont. 118, 272 P.3d 43 (2012).

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IV. Construction of Constitutions

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3. Construction of Federal Constitution on State Court's Construction of State Constitution; as Binding

§ 87. Construction of Federal Constitution on state court's construction of state constitution as persuasive on state court's construction of state constitution

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West's Key Number Digest

West's Key Number Digest, Constitutional Law 617, 618

Although state courts, in construing provisions of state constitutions, are not required to follow federal courts' constructions of similar federal constitutional provisions,[1] such federal construction may be highly persuasive,[2] and a state court will generally follow the federal court decision if and to the extent that it is persuasive and helpful,[3] is not inconsistent with the protections afforded by the state constitution,[4] and provides useful guidance on the issue being considered,[5] especially where state law is silent on the issue.[6]

Observation:

State constitutional provisions may confer greater, fewer, or the same rights as similar provisions of the United States Constitution, and decisions of the United States Supreme Court interpreting those similar provisions are persuasive in the state supreme court's interpretation of the state constitution only to the extent that those decisions are rooted in shared history, language, and context.[7] Thus, the construction of similar federal constitutional provisions, though persuasive authority, is not binding on the state's construction of its own constitution.[8]

It has been held that differences in structure between the Federal and State Constitutions always favor an independent state interpretation[9] although it has also been held that adoption of federal constitutional precedents that appropriately illuminate open textured provisions of a state constitution in no way compromises the state court's obligation independently to construe such provisions.[10]

Footnotes

1 Gilbert v. Flandreau Santee Sioux Tribe, 2006 SD 109, 725 N.W.2d 249 (S.D. 2006).

2 Washington v. Meachum, 238 Conn. 692, 680 A.2d 262 (1996).

3 State v. Trine, 236 Conn. 216, 673 A.2d 1098 (1996).
Ordinarily, to the extent that a provision of the Maryland Constitution is held to be in pari materia with its federal counterpart, the two constitutional provisions are to be applied in like manner and to the same extent, and decisions of the United States Supreme Court on the federal provision are practically direct authorities for interpreting the Maryland provision. Green v. Zendrian, 916 F. Supp. 493 (D. Md. 1996).

4 State v. McCaughey, 127 Idaho 669, 904 P.2d 939, 65 A.L.R.5th 745 (1995).

5 Mors v. Williams, 791 F. Supp. 739 (N.D. Ill. 1992); State v. Cavanaugh, 138 N.H. 193, 635 A.2d 1382 (1993).

6 Moule' By and Through Moule' v. Paradise Valley Unified School Dist. No. 69, 863 F. Supp. 1098, 94 Ed. Law Rep. 1345 (D. Ariz. 1994), decision rev'd on other grounds, 66 F.3d 335 (9th Cir. 1995).

7 State v. Turnquest, 305 Ga. 758, 827 S.E.2d 865 (2019).

8 Elliott v. State, 305 Ga. 179, 824 S.E.2d 265 (2019).

9 Richmond v. Thompson, 130 Wash. 2d 368, 922 P.2d 1343 (1996).
Although it may be useful to reexamine federal case law as guidance in interpreting the Pennsylvania Constitution, the rich, unique history of the Pennsylvania Constitution requires an independent analysis under that primary Commonwealth charter in each case. Com. v. Lewis, 528 Pa. 440, 598 A.2d 975 (1991).

10 State v. Lamme, 216 Conn. 172, 579 A.2d 484 (1990).

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IV. Construction of Constitutions

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3. Construction of Federal Constitution on State Court's Construction of State Constitution; as Binding

§ 88. Construction of Federal Constitution on state court's construction of state constitution where state and federal constitutional provisions are substantially similar

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West's Key Number Digest

West's Key Number Digest, Constitutional Law 617, 618

Where federal and state constitutional provisions are substantially similar, they may be deemed identical in scope, import, and purpose[1] and may be considered together[2] as in pari materia[3] and construed similarly[4] unless the greater protection found in the state constitution "is deeply rooted in the document."[5] A decision to interpret a state constitution differently from the Federal Constitution should not be made cavalierly.[6] Courts are cautious and conservative when asked to expand constitutional rights under a state constitution, particularly when the provision in the state constitution is akin to a provision in the Federal Constitution.[7] In other words, a state court should not find that a section of a state constitution grants either less protection[8] or greater protection than the Federal Constitution with regard to identically worded provisions unless there is a compelling reason found in history and the intention of the document to do so.[9] For instance, a state supreme court typically departs from federal interpretations of similar constitutional provisions where appropriate interpretive grounds, such as textual differences or historical context, support such different interpretations.[10] If there is such a reason, then adoption by a court, for purposes of state constitutional analysis, of an analytical framework used under the Federal Constitution does not preclude the court from concluding that a statute that would be valid under the Federal Constitution is nevertheless invalid under a state constitution.[11] Thus, a state which adopts the language of the Fourteenth Amendment to the Federal Constitution in its own bill of rights adopts with it the interpretation it has received.[12]

Observation:

The Supreme Court of Illinois applies a limited lockstep approach when interpreting cognate provisions of the State and Federal Constitutions: if a provision in the state constitution is similar to a provision in the Federal Constitution, but differs from it in some significant respect, the language of the state provision must be given effect; if a provision of the state constitution is identical to or synonymous with the federal constitutional provision, federal authority on the provision prevails, unless the language of state constitution, the constitutional convention debates and committee reports, or state custom and practice indicate that the provisions of state constitution are intended to be construed differently.[13]

However, the state supreme court jealously guards its right to construe a provision of the state constitution differently than its federal counterpart, though the two provisions may contain nearly identical language and have the same general scope, import, and purpose.[14] It has been noted that a state constitution has unique vitality even where its words parallel federal language[15] and that a state court may interpret the provisions of a state constitution independently of their federal analogues.[16] Thus, states are free to interpret their own due process clauses to afford protection beyond that granted by the Federal Constitution[17] even when the two constitutions are similarly or identically phrased.[18]

Footnotes

1 Green v. Zendrian, 916 F. Supp. 493 (D. Md. 1996); In re Interest of Anaya, 276 Neb. 825, 758 N.W.2d 10 (2008).

2 State v. Noble, 171 Ariz. 171, 829 P.2d 1217 (1992); In re Ross, 158 Vt. 122, 605 A.2d 524 (1992).
Provisions of the state constitution which have analogues in the Federal Constitution are generally interpreted to have the same meaning. In re Graves, 217 S.W.3d 744 (Tex. App. Waco 2007).

3 Green v. Zendrian, 916 F. Supp. 493 (D. Md. 1996); Com. v. Kunish, 529 Pa. 206, 602 A.2d 849 (1992).
The confrontation clauses of the Sixth Amendment to United States Constitution and of the Maryland Declaration of Rights are in pari materia. Simmons v. State, 333 Md. 547, 636 A.2d 463 (1994).

4 McCrory v. State, 342 So. 2d 897 (Miss. 1977); Housing Authority of King County v. Saylors, 87 Wash. 2d 732, 557 P.2d 321 (1976).

5 People v. Pickens, 446 Mich. 298, 521 N.W.2d 797 (1994).

6 State v. Rodriguez, 738 N.W.2d 422 (Minn. Ct. App. 2007), aff'd, 754 N.W.2d 672 (Minn. 2008).

7 State v. Gardner, 118 Ohio St. 3d 420, 2008-Ohio-2787, 889 N.E.2d 995 (2008).

8 State v. Furman, 122 Wash. 2d 440, 858 P.2d 1092 (1993).

9 People v. Pickens, 446 Mich. 298, 521 N.W.2d 797 (1994).
Courts construe the state constitution as providing greater rights to its citizens than the Federal Constitution only where there is a compelling reason to do so. Com. v. Basking, 2009 PA Super 67, 970 A.2d 1181 (2009).

10 State v. Decosimo, 555 S.W.3d 494 (Tenn. 2018), cert. denied, 139 S. Ct. 817, 202 L. Ed. 2d 577 (2019).

11 Fair Cadillac-Oldsmobile Isuzu Partnership v. Bailey, 229 Conn. 312, 640 A.2d 101 (1994).

12 Clark v. Pacificorp, 118 Wash. 2d 167, 822 P.2d 162 (1991).

13 Kakos v. Butler, 2016 IL 120377, 407 Ill. Dec. 469, 63 N.E.3d 901 (Ill. 2016).

14 State v. Brown, 930 N.W.2d 840 (Iowa 2019).

15 Wallace v. State, 905 N.E.2d 371 (Ind. 2009).

16 State v. Ice, 343 Or. 248, 170 P.3d 1049 (2007), judgment rev'd on other grounds, 555 U.S. 160, 129 S. Ct. 711, 172 L. Ed. 2d 517 (2009) and decision modified on other grounds, 346 Or. 95, 204 P.3d 1290 (2009).
Utah courts do not presume that federal court interpretations of federal constitutional provisions control the meaning of identical provisions in the Utah Constitution. State v. Briggs, 2008 UT 83, 199 P.3d 935 (Utah 2008).

17 Rollins v. Ellwood, 141 Ill. 2d 244, 152 Ill. Dec. 384, 565 N.E.2d 1302 (1990); State v. Feregrino, 756 N.W.2d 700 (Iowa 2008); Women's Health Center of West Virginia, Inc. v. Panepinto, 191 W. Va. 436, 446 S.E.2d 658 (1993).

18 Messenger v. Messenger, 1992 OK 27, 827 P.2d 865 (Okla. 1992).

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16 Am. Jur. 2d Constitutional Law § 89

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IV. Construction of Constitutions

C. Effect of Extrinsic Sources

3. Construction of Federal Constitution on State Court's Construction of State Constitution; as Binding

§ 89. Federal Constitution as providing floor for state constitutional rights

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 617, 618

The protections in the Federal Constitution provide a constitutional floor[1] such that the Federal Constitution establishes a minimum level of protection to citizens of all states,[2] but nothing prevents a state court from equaling or exceeding the federal standard.[3] In other words, a state constitution may be construed to afford broader[4] but not narrower rights than similar federal constitutional provisions.[5] State courts are free to expand individual rights beyond the federal floor.[6] Factors to consider when evaluating whether a state constitution affords greater protection than the Federal Constitution are:

• the text of the state constitutional provision;[7]

• the history of the provision, including state case law;[8]

• related case law from other states;[9]

• issues of state and local concern;[10]

• differences in the texts of parallel provisions of the Federal and State Constitutions;[11]

• structural differences between the Federal and State Constitutions.[12]

Observation:

The factors a court should consider in determining whether a provision of the state constitution should be given an interpretation independent from that given to the corresponding federal constitutional provision parallel interpretive inquiries made when determining whether the state constitution ultimately provides greater protection than its corresponding federal provision.[13]

Practice Tip:

When a party asserts a state constitutional right that has not been interpreted differently than its federal analog, the party must assert in the trial court that the state constitutional provision at issue should be interpreted more expansively than the federal counterpart and provide reasons for interpreting the state provision differently from the federal provision.[14] When a defendant asserts that a state constitution affords greater protection than the corresponding provision of the Federal Constitution, it is the defendant's burden to demonstrate something in the text, context, or history of the state constitution that justifies this divergent interpretation.[15]

When state and federal constitutional protections are coextensive, a federal court can decide federal constitutional claims because to do so will decide state constitutional claims as well but when protections are not coextensive and the state constitution provides greater protection, a court will decide a case on state constitutional grounds so as to avoid unnecessarily addressing federal constitutional claims.[16] Where federal constitutional law is not more favorable to one who asserts violations of both the State and Federal Constitutions, a state supreme court begins its analysis under the state constitution[17] and does not need to make a separate federal analysis[18] unless the Federal Constitution provides greater protection than the state constitution.[19] However, a state constitutional provision which is based on a federal statute should usually be construed in the same manner as the federal statute.[20]

Footnotes

1 State v. Briggs, 2008 UT 83, 199 P.3d 935 (Utah 2008).

2 Hendricks v. State, 897 N.E.2d 1208 (Ind. Ct. App. 2008).

3 Wilson v. State, 123 Nev. 587, 170 P.3d 975 (2007); State v. Oliveira, 961 A.2d 299 (R.I. 2008).

4 State v. Weaver, 374 S.C. 313, 649 S.E.2d 479 (2007); State v. Rutherford, 223 W. Va. 1, 672 S.E.2d 137 (2008).
Federal constitutional and statutory law establishes a minimum national standard for the exercise of individual rights and does not inhibit state governments from affording higher levels of protection for such rights. Kerrigan v. Commissioner of Public Health, 289 Conn. 135, 957 A.2d 407 (2008).
Federal Constitution generally sets the floor, not the ceiling, with regard to the extent of personal rights and freedoms afforded by the State of Florida. State v. Kelly, 999 So. 2d 1029 (Fla. 2008).

5 Satterfield v. Crown Cork & Seal Co., Inc., 268 S.W.3d 190 (Tex. App. Austin 2008); State v. Read, 165 Vt. 141, 680 A.2d 944 (1996).
The Federal Constitution establishes rights that the states may choose to expand, but the Supremacy Clause precludes any state doctrine that restricts a federal constitutional right. Edwards v. State, 902 N.E.2d 821 (Ind. 2009).

6 Blue Movies, Inc. v. Louisville/Jefferson County Metro Government, 317 S.W.3d 23 (Ky. 2010).

7 Com. v. Basking, 2009 PA Super 67, 970 A.2d 1181 (2009).

8 Com. v. Basking, 2009 PA Super 67, 970 A.2d 1181 (2009).

9 Com. v. Basking, 2009 PA Super 67, 970 A.2d 1181 (2009).

10 Com. v. Basking, 2009 PA Super 67, 970 A.2d 1181 (2009).

11 Madison v. State, 161 Wash. 2d 85, 163 P.3d 757 (2007).

12 Madison v. State, 161 Wash. 2d 85, 163 P.3d 757 (2007).

13 Madison v. State, 161 Wash. 2d 85, 163 P.3d 757 (2007).
As to factors a court should consider in determining whether a provision of a state constitution should be given an interpretation independent from that given to the corresponding federal constitutional provision, see § 86.

14 State v. Lujan, 143 N.M. 233, 2008-NMCA-003, 175 P.3d 327 (Ct. App. 2007).

15 Harris v. State, 195 P.3d 161 (Alaska Ct. App. 2008).

16 State v. Perry, 610 So. 2d 746 (La. 1992); State v. Young, 123 Wash. 2d 173, 867 P.2d 593 (1994).

17 State v. Westover, 140 N.H. 375, 666 A.2d 1344 (1995).

18 State v. Justus, 140 N.H. 413, 666 A.2d 1353 (1995).

19 State v. Delisle, 137 N.H. 549, 630 A.2d 767 (1993).

20 Baumgardner v. State ex rel. Fulton, 48 Ohio App. 5, 1 Ohio Op. 50, 16 Ohio L. Abs. 671, 192 N.E. 349 (6th Dist. Lucas County 1934).

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16 Am. Jur. 2d Constitutional Law § 90

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IV. Construction of Constitutions

C. Effect of Extrinsic Sources

4. Contemporaneous or Long-Continued Construction

§ 90. Contemporaneous or long-continued constitutional construction, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 607, 609

In questions of constitutional construction, as in the determination of the constitutionality of statutes, great weight has always been attached to a contemporaneous exposition of the meaning of fundamental law[1] not only where such interpretation is that of the courts[2] but also where it is that of other departments of government.[3]

"Contemporanea expositio est optima et fortissima in lege" is a maxim of the civil law resting on a foundation of solid reason.[4] The doctrine has such prevalence that it is applicable, not only in the exposition of statutes but also in the interpretation of constitutions of governments.[5] The presumption is that those who were the contemporaries of the makers of the constitution have claims to the deference of later tribunals because they had the best opportunities of informing themselves of the understanding of the framers and of the sense put upon the constitution by the people when it was adopted.[6] Similarly, a construction which has been long accepted by the various agencies of government and by the people will usually be accepted as correct by the judiciary[7] or will at least be given great weight[8] or consideration[9] unless it is manifestly contrary to the letter or spirit of the Constitution,[10] and a court may take judicial notice of widespread opinion and general practices in the interpretation of constitutional provisions.[11] The general principle favoring contemporaneous construction is usually applied more cautiously to constitutions than to laws, the ability to change the law easily, by legislative action, giving more force to a construction in conformity to usage than is justified in the case of a constitutional provision which cannot be so readily altered.[12]

Under the general rule requiring that every part of a constitution be given effect,[13] a contemporaneous construction placed upon a constitutional provision will not be permitted to overturn and negate a clear provision of the constitution in cases where the meaning of a clause in the instrument is capable of two interpretations.[14] Contemporaneous construction is further limited by the principle of priority in time under which nonjudicial construction of a constitutional provision subsequent to a judicial construction by the courts is of no effect in ascertaining its meaning,[15] and by the rule that contemporaneous construction can never be allowed to enlarge, restrict, or contradict the plain meaning of the text.[16] In addition, habit and tradition are not in themselves an adequate answer to a constitutional challenge.[17]

Footnotes

1 Okanogan, Methow, San Poelis (or San Poil), Nespelem, Colville, and Lake Indian Tribes or Bands of State of Washington v. U.S., 279 U.S. 655, 49 S. Ct. 463, 73 L. Ed. 894, 64 A.L.R. 1434 (1929); In re Great Outdoors Colorado Trust Fund, 913 P.2d 533 (Colo. 1996); Washington v. Meachum, 238 Conn. 692, 680 A.2d 262 (1996).

2 People v. District Court of Appeal, 193 Cal. 19, 222 P. 353 (1924).
If a constitutional provision has received a settled judicial interpretation and is incorporated into a new constitution, it will be presumed to have been retained with knowledge of the previous construction and courts will be bound to adhere thereto. Atlanta Independent School System v. Lane, 266 Ga. 657, 469 S.E.2d 22, 108 Ed. Law Rep. 1297 (1996).

3 City and County of San Francisco v. County of San Mateo, 10 Cal. 4th 554, 41 Cal. Rptr. 2d 888, 896 P.2d 181 (1995).
As to legislative construction, see § 92.
As to executive and administrative construction, see § 94.

4 Northwestern Mut. Life Ins. Co. v. Johnson, 8 Cal. 2d 42, 63 P.2d 814 (1936).

5 State Dept. of Civil Service v. Clark, 15 N.J. 334, 104 A.2d 685 (1954).

6 In re Interrogatory of Governor, 162 Colo. 188, 425 P.2d 31 (1967); Johnson v. Duke, 180 Md. 434, 24 A.2d 304 (1942).

7 Okanogan, Methow, San Poelis (or San Poil), Nespelem, Colville, and Lake Indian Tribes or Bands of State of Washington v. U.S., 279 U.S. 655, 49 S. Ct. 463, 73 L. Ed. 894, 64 A.L.R. 1434 (1929); City and County of San Francisco v. County of San Mateo, 10 Cal. 4th 554, 41 Cal. Rptr. 2d 888, 896 P.2d 181 (1995).

8 Okanogan, Methow, San Poelis (or San Poil), Nespelem, Colville, and Lake Indian Tribes or Bands of State of Washington v. U.S., 279 U.S. 655, 49 S. Ct. 463, 73 L. Ed. 894, 64 A.L.R. 1434 (1929).
The construction of the Constitution which has been followed since the founding of our government is undoubtedly due the greatest respect. Ex parte Quirin, 317 U.S. 1, 63 S. Ct. 2, 87 L. Ed. 3 (1942), order modified on other grounds, 63 S. Ct. 22 (1942).
As to long-continued acquiescence in construction of constitutional provisions, see § 91.

9 Clark v. Pawlenty, 755 N.W.2d 293 (Minn. 2008).

10 Downes v. Bidwell, 182 U.S. 244, 21 S. Ct. 770, 45 L. Ed. 1088 (1901).

11 Schieffelin v. Hylan, 236 N.Y. 254, 140 N.E. 689 (1923).

12 Leighton v. Abell, 225 Minn. 565, 31 N.W.2d 646 (1948).

13 § 66.

14 Amos v. Moseley, 74 Fla. 555, 77 So. 619 (1917); Connors v. Jefferson County Fiscal Court, 277 Ky. 23, 125 S.W.2d 206 (1938).

15 State ex rel. Hudson v. Carter, 1933 OK 588, 167 Okla. 32, 27 P.2d 617, 91 A.L.R. 1497 (1933).

16 Johnson v. Duke, 180 Md. 434, 24 A.2d 304 (1942); Leighton v. Abell, 225 Minn. 565, 31 N.W.2d 646 (1948).

17 Bates v. State Bar of Arizona, 433 U.S. 350, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977).

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IV. Construction of Constitutions

C. Effect of Extrinsic Sources

4. Contemporaneous or Long-Continued Construction

§ 91. Effect of acquiescence in construction of constitutional provisions

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 607, 609

It is a settled rule of constitutional construction that a long-continued understanding and application of a provision in a constitution amounts to a practical construction of it.[1] Such a construction, acquiesced in for many years, is frequently resorted to by the courts[2] because it is entitled to great weight and deference[3] and because it can be a valuable interpretive aid[4] and a safe guide to the constitutional provision's proper interpretation[5] and will not be disregarded unless it clearly appears that it is erroneous and unauthorized.[6] Similarly, the fact that for many years a certain construction has been assumed to apply to a constitutional provision is of important force in determining its meaning.[7] However, though such a construction is entitled to great weight, it is not controlling,[8] and the final responsibility for the interpretation of the law rests with the courts[9] which resort to extrinsic aids such as "contemporaneous construction" only when the constitutional language is ambiguous and unclear.[10]

The general rule is that the exercise of powers and general acquiescence therein for a long period of years, especially if commencing with the organization of the government, may be treated as fixing the construction of the Constitution and as amounting to a contemporary and practical exposition of it[11] and may be sufficient to demonstrate that powers conferred by a statute are not inconsistent with the provisions of the fundamental law.[12] On the other hand, no acquiescence for any length of time can legalize a usurpation of power where the people have plainly expressed their will in the constitution and established judicial tribunals to enforce it.[13]

Footnotes

1 Wallace v. Payne, 197 Cal. 539, 241 P. 879 (1925); Director of Dept. of Agriculture and Environment v. Printing Industries Ass'n of Texas, 600 S.W.2d 264 (Tex. 1980).

2 Schaefer v. Thomson, 240 F. Supp. 247 (D. Wyo. 1964); Opinion of the Justices, 256 Ala. 154, 53 So. 2d 740 (1951).

General acquiescence cannot justify a departure from the law, but a long and continuous interpretation in the course of official action under the law may aid in removing doubts as to its meaning. This is especially true in the case of constitutional provisions governing the exercise of political rights and hence, subject to constant and careful scrutiny. Smiley v. Holm, 285 U.S. 355, 52 S. Ct. 397, 76 L. Ed. 795 (1932).

3 Adams v. Commission on Judicial Performance, 8 Cal. 4th 630, 34 Cal. Rptr. 2d 641, 882 P.2d 358 (1994).

4 Aerospace Optimist Club of Fort Worth v. Texas Alcoholic Beverage Com'n, 886 S.W.2d 556 (Tex. App. Austin 1994).

5 State ex rel. Udall v. Colonial Penn Ins. Co., 1991-NMSC-048, 112 N.M. 123, 812 P.2d 777 (1991).

6 Hendrick v. Walters, 1993 OK 162, 865 P.2d 1232 (Okla. 1993).

7 In re Becker, 179 A.D. 789, 167 N.Y.S. 118 (2d Dep't 1917), aff'd, 221 N.Y. 681, 117 N.E. 610 (1917).

8 Rampton v. Barlow, 23 Utah 2d 383, 464 P.2d 378 (1970).

9 Bates v. State Bd. of Equalization, 275 Cal. App. 2d 388, 79 Cal. Rptr. 837 (1st Dist. 1969).

10 ITT World Communications, Inc. v. City and County of San Francisco, 37 Cal. 3d 859, 210 Cal. Rptr. 226, 693 P.2d 811 (1985).

11 Inland Waterways Corporation v. Young, 309 U.S. 517, 60 S. Ct. 646, 84 L. Ed. 901 (1940); U.S. v. Curtiss-Wright Export Corporation, 299 U.S. 304, 57 S. Ct. 216, 81 L. Ed. 255 (1936).

12 Greene v. Esquibel, 1954-NMSC-039, 58 N.M. 429, 272 P.2d 330 (1954); Koenig v. Flynn, 258 N.Y. 292, 179 N.E. 705 (1932), aff'd, 285 U.S. 375, 52 S. Ct. 403, 76 L. Ed. 805 (1932).

As to whether the constitutionality of a statute is shown by proof of acquiescence in its validity, generally, see §§ 181, 182.

13 Johnson v. Duke, 180 Md. 434, 24 A.2d 304 (1942).

The practical construction placed on constitutional provisions, when long acquiesced in, is of aid to the courts in determining the meaning of the language of a constitutional provision, but it cannot be controlling so as to amend the constitution by means of a series of mutual mistakes, and especially is this true where the language is otherwise clear. Rampton v. Barlow, 23 Utah 2d 383, 464 P.2d 378 (1970).

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IV. Construction of Constitutions

C. Effect of Extrinsic Sources

5. Construction by Governmental Entities

§ 92. Legislative construction of constitutional provisions

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 611

The principle of contemporaneous construction may be applied to the construction given by the legislature to the constitutional provisions dealing with legislative powers and procedure.[1] Though not conclusive, such interpretation is generally conceded as having great weight[2] or persuasive significance.[3] The legislative history[4] and the contemporaneous construction of a constitutional provision by the legislature that has been continued and followed for a long time are valuable aids as to its proper interpretation[5] are entitled to great weight and careful consideration when courts interpret the provision,[6] are presumed to be correct,[7] and should not be departed from unless manifestly erroneous.[8]

For purposes of using a contemporaneous construction by the legislature of an ambiguous constitutional provision as a guide to the drafters' intent, "contemporaneous" refers to a legislative construction occurring close in time to when the constitutional provision was enacted.[9] When courts look to the history, public policy, and reason for an amendment to the state constitution, courts keep in mind that a contemporaneous construction by the legislature of a constitutional provision is a safe guide to its proper interpretation and creates a strong presumption that the interpretation was proper, because it is likely that legislation drafted near in time to the constitutional provision reflects the constitutional drafters' mindset.[10] While neither length of time nor legislative action, though oft repeated, will sanction a violation of the organic law, resort may be had to such sources to discover the meaning of a provision of doubtful import.[11] Legislative history written and circulated after passage of a state constitutional measure is not, however, relevant to any determination of the intent of those who voted for the measure.[12] A legislative analyst's comments, like other materials presented to voters, may be helpful but are not conclusive in determining the probable meaning of initiative language, and thus, when other statements in election materials contradict the legislative analyst's

comments, a state supreme court does not automatically assume that the latter accurately reflects the voters' understanding.[13] Moreover, a legislative declaration defining a constitutional term decades after the term entered the constitution cannot change the meaning of that term; the interpretation of constitutional text is a judicial function, not a legislative one.[14]

Footnotes

1 City and County of San Francisco v. County of San Mateo, 10 Cal. 4th 554, 41 Cal. Rptr. 2d 888, 896 P.2d 181 (1995).

2 United States v. Sprague, 282 U.S. 716, 51 S. Ct. 220, 75 L. Ed. 640, 71 A.L.R. 1381 (1931); Mt. San Jacinto Community College Dist. v. Superior Court, 40 Cal. 4th 648, 54 Cal. Rptr. 3d 752, 151 P.3d 1166 (2007).

3 Harmelin v. Michigan, 501 U.S. 957, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991) (actions of the First Congress are persuasive evidence of what the Constitution means); Greater Loretta Imp. Ass'n v. State ex rel. Boone, 234 So. 2d 665, 42 A.L.R.3d 632 (Fla. 1970).
When the legislature is charged with implementing an unclear constitutional provision, the legislature's interpretation of the measure deserves great deference. People v. Giordano, 42 Cal. 4th 644, 68 Cal. Rptr. 3d 51, 170 P.3d 623 (2007).

4 Zachman v. Whirlpool Financial Corp., 123 Wash. 2d 667, 869 P.2d 1078 (1994).

5 Agency for Health Care Admin. v. Associated Industries of Florida, Inc., 678 So. 2d 1239 (Fla. 1996).

6 Halverson v. Secretary of State, 124 Nev. 484, 186 P.3d 893 (2008).

7 American Bankers Ins. Co. v. Chiles, 675 So. 2d 922 (Fla. 1996).

8 Service Ins. Co. v. Chiles, 660 So. 2d 734 (Fla. 1st DCA 1995), decision approved, 675 So. 2d 922 (Fla. 1996).

9 Halverson v. Secretary of State, 124 Nev. 484, 186 P.3d 893 (2008).

10 Ramsey v. City of North Las Vegas, 133 Nev. 96, 392 P.3d 614 (2017).

11 Agency for Health Care Admin. v. Associated Industries of Florida, Inc., 678 So. 2d 1239 (Fla. 1996).

12 County of Fresno v. Malmstrom, 94 Cal. App. 3d 974, 156 Cal. Rptr. 777 (5th Dist. 1979).

13 San Francisco Taxpayers Assn. v. Board of Supervisors, 2 Cal. 4th 571, 7 Cal. Rptr. 2d 245, 828 P.2d 147 (1992).

14 Georgia Motor Trucking Association v. Georgia Department of Revenue, 301 Ga. 354, 801 S.E.2d 9 (2017).

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IV. Construction of Constitutions

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5. Construction by Governmental Entities

§ 93. Legislative construction of constitutional provisions—Congressional construction

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West's Key Number Digest

West's Key Number Digest, Constitutional Law 611

As in the case of legislative construction generally,[1] a practical construction by Congress of a provision of the Constitution is entitled to great weight[2] and ought not to be lightly disregarded.[3] This is especially the case with respect to the construction placed on constitutional provisions by the First Congress.[4]

A long-continued practical construction by Congress of powers under the provisions of the Constitution should be taken as fixing the meaning of such provisions[5] although one court has held that the ordinary deference it gives to legislative fact-finding does not translate into deference to congressional constructions of constitutional demands.[6]

Caution:

The Supreme Court has issued a word of caution about using congressional practices to construe the Constitution, pointing out that the weight of congressional legislation to support or change a particular construction of the Constitution must depend not only upon the nature of the question but also upon the attitude of the executive and judicial branches of the government, as well as upon the number of instances in the execution of the law in which opportunity for objection in the courts or elsewhere is afforded.[7] Furthermore, the court has pointed out that neither a long-standing congressional authorization nor a widely prevailing practice justifies a constitutional violation.[8]

Footnotes

1 § 92.

2 Ex parte Quirin, 317 U.S. 1, 63 S. Ct. 2, 87 L. Ed. 3 (1942), order modified on other grounds, 63 S. Ct. 22 (1942).

3 M'Culloch v. State, 17 U.S. 316, 4 L. Ed. 579, 1819 WL 2135 (1819).

4 Michel v. Anderson, 14 F.3d 623 (D.C. Cir. 1994).
Actions of the First Congress are persuasive evidence of what the Constitution means. Harmelin v. Michigan, 501 U.S. 957, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991).

5 J.W. Hampton, Jr., & Co. v. U.S., 276 U.S. 394, 48 S. Ct. 348, 72 L. Ed. 624 (Cust. App. 1928); McGrain v. Daugherty, 273 U.S. 135, 47 S. Ct. 319, 71 L. Ed. 580, 50 A.L.R. 1 (1927).

6 Freedom Republicans, Inc. v. Federal Election Com'n, 13 F.3d 412 (D.C. Cir. 1994).

7 Springer v. Government of Philippine Islands, 277 U.S. 189, 48 S. Ct. 480, 72 L. Ed. 845 (1928); Myers v. U.S., 272 U.S. 52, 47 S. Ct. 21, 71 L. Ed. 160 (1926).

8 U.S. v. Martinez-Fuerte, 428 U.S. 543, 96 S. Ct. 3074, 49 L. Ed. 2d 1116 (1976).

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IV. Construction of Constitutions

C. Effect of Extrinsic Sources

5. Construction by Governmental Entities

§ 94. Executive and administrative construction of constitutional provisions

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 612

In line with the general rule as to the weight to be accorded contemporaneous and long-continued construction of constitutional provisions,[1] an administrative construction of a constitutional provision that generally has been accepted and acted upon over a long period of years while not binding upon the courts is entitled to great weight[2] or at least serious consideration[3] by the courts in determining the meaning of the provision, and they generally will not depart from such a construction unless it is clearly erroneous or unauthorized.[4] There is authority to the contrary, however, some courts holding that the deference which courts give administrative agencies on questions of statutory interpretation does not extend to constitutional issues.[5]

The construction placed upon a particular constitutional provision by the President,[6] a governor,[7] an attorney general or legislative counsel,[8] a state auditor,[9] or other specific executive or administrative officials will be taken into consideration by the courts[10] although at least one court has held that the federal judiciary does not owe any deference to the Executive Branch's interpretation of the Constitution.[11]

Observation:

The Supreme Court, in a case involving a claim of absolute executive privilege by the President of the United States with respect to the celebrated *Watergate* tape recordings, said that while in the performance of assigned constitutional duties, each branch of the government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others, our system of government nevertheless requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch.[12]

Footnotes

1 § 90.

2 Patterson Recall Committee, Inc. v. Patterson, 209 P.3d 1210 (Colo. App. 2009); Tilton v. Marshall, 925 S.W.2d 672 (Tex. 1996).

3 Allen v. Burkhart, 1962 OK 279, 377 P.2d 821 (Okla. 1962).

4 Campos v. I.N.S., 961 F.2d 309 (1st Cir. 1992); Adams v. Commission on Judicial Performance, 8 Cal. 4th 630, 34 Cal. Rptr. 2d 641, 882 P.2d 358 (1994).
Whatever the Mississippi Supreme Court's duty is to defer to an agency interpretation and practice in areas of administration committed by law to their responsibility, that duty has no material force where the agency interpretation is contrary to statutory or constitutional language. Mississippi State Tax Com'n v. Moselle Fuel Co., 568 So. 2d 720 (Miss. 1990).

5 Forbes v. Arkansas Educational Television Communication Network Foundation, 22 F.3d 1423 (8th Cir. 1994).

6 Okanogan, Methow, San Poelis (or San Poil), Nespelem, Colville, and Lake Indian Tribes or Bands of State of Washington v. U.S., 279 U.S. 655, 49 S. Ct. 463, 73 L. Ed. 894, 64 A.L.R. 1434 (1929).

7 State ex rel. Kurz v. Lee, 121 Fla. 360, 163 So. 859 (1935).

8 Campos v. I.N.S., 961 F.2d 309 (1st Cir. 1992); People v. Union Oil Co., 268 Cal. App. 2d 566, 74 Cal. Rptr. 78 (2d Dist. 1968).
The attorney general's opinion, though always merely advisory on a constitutional issue, is nonetheless binding upon state officials whom it affects; public officers have a duty to follow those opinions until they are judicially relieved of compliance. Hendrick v. Walters, 1993 OK 162, 865 P.2d 1232 (Okla. 1993).

9 State ex rel. Guilbert v. Lewis, 69 Ohio St. 202, 69 N.E. 132 (1903).

10 Martin v. Riley, 20 Cal. 2d 28, 123 P.2d 488 (1942).

11 Trump v. Vance, 941 F.3d 631 (2d Cir. 2019), cert. granted, 140 S. Ct. 659, 205 L. Ed. 2d 418 (2019); Public Citizen v. Burke, 843 F.2d 1473 (D.C. Cir. 1988).

12 U.S. v. Nixon, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974).

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IV. Construction of Constitutions

C. Effect of Extrinsic Sources

6. Circumstances Attending Adoption of Provisions; Existing Conditions, Laws, and History

§ 95. Circumstances surrounding adoption of constitutional provisions considered in construction of constitutional provisions, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 603 to 606

In analyzing a provision of a constitution, a court considers the historical circumstances that led to its creation.[1] A constitutional provision must be construed in the light of the circumstances under which it was adopted and the history which preceded it.[2] When it is necessary to interpret a constitution, the court looks to the language of the text in the context of the history surrounding its drafting and ratification, the purpose and structure of the constitution, and case law interpreting the specific provisions.[3] Thus, a court construing the provisions of a constitution may consult the history of the times and examine the state of affairs as they existed when the constitution was framed and adopted.[4] A court may consider such matters as the history of the legislation, the conditions and spirit of the times, the prevailing sentiments of the people, the evils intended to be remedied, and the good to be accomplished.[5]

Observation:

By reviewing the history of a constitution and its amendments, for the purposes of interpreting a constitutional provision, the court endeavors to place itself as nearly as possible in the situation of the parties at the time the instrument was made, that it may gather the intention of the electorate from the language used, viewed in the light of the surrounding circumstances.[6]

A court imputes to the framers of a constitution the contemporary understanding of and judicial construction given to the provision they adopted, particularly when they singled out another state's approach and copied it virtually verbatim into the constitution.[7]

Reference to historic materials is especially important where the court has been presented with a choice of interpretations or with plausible alternative readings of a particular word, phrase, or section of a constitutional provision.[8] For instance, arguments or explanations made in election materials, ballots, or brochures may be considered in construing constitutional amendments adopted by popular vote.[9] However, in interpreting a constitutional amendment adopted by initiative, the supreme court is generally reluctant to read too much into a statement in a voters' pamphlet because of its political nature.[10] The United States Supreme Court has frequently followed this procedure by making reference to historical materials both before and after adoption of the Federal Constitution and the amendments thereto and to practices and usages in this country at that time as aids in the interpretation of particular constitutional provisions.[11]

A constitutional provision must be presumed to have been framed and adopted in the light and understanding of prior and existing laws and with reference to them.[12] An understanding of the meaning of constitutional language makes appropriate a review of the background and environment of the period in which that constitutional language was fashioned and adopted.[13] Reference may be made as well to the historical facts relating to the origin of the political institutions of the community[14] and to prior well-known practices and usages.[15] However, neither statutes enacted nor judicial opinions rendered since the adoption of a constitution can impute a different meaning to it than that obviously intended at the time the constitution was adopted.[16] Further, while uniform historical practice is relevant to the meaning of an ambiguous federal constitutional provision, a proffered meaning cannot be supported by historical practices where those practices are not uniform and the core meaning of the provisions are unambiguous.[17]

Footnotes

1 Pendleton School Dist. 16R v. State, 345 Or. 596, 200 P.3d 133, 241 Ed. Law Rep. 423 (2009).

2 Sierra Club v. Department of Transportation of State of Hawai'i, 120 Haw. 181, 202 P.3d 1226 (2009), as amended, (May 13, 2009).

3 McCullough v. State, 900 N.E.2d 745 (Ind. 2009).

4 Riley v. Rhode Island Dept. of Environmental Management, 941 A.2d 198 (R.I. 2008).
Historical practice is relevant to what the Constitution means by such concepts as trial by jury. U.S. v. Gaudin, 515 U.S. 506, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995).

5 Harris County Hosp. Dist. v. Tomball Regional Hosp., 283 S.W.3d 838 (Tex. 2009).
The supreme judicial court construes the language of a constitutional provision in the light of the conditions under which it was framed, the ends designed to be accomplished, the benefits expected to be conferred, and the evils hoped to be remedied. In re Opinion of the Justices to the Governor, 461 Mass. 1205, 964 N.E.2d 941 (2012).

6 Opinion of the Justices, 157 N.H. 265, 949 A.2d 670 (2008).

7 Arizona Together v. Brewer, 214 Ariz. 118, 149 P.3d 742 (2007).

8 Coultas v. City of Sutherlin, 318 Or. 584, 871 P.2d 465 (1994).

9 Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority, 44 Cal. 4th 431, 79 Cal. Rptr. 3d 312, 187 P.3d 37 (2008); Zachman v. Whirlpool Financial Corp., 123 Wash. 2d 667, 869 P.2d 1078 (1994).

10 Wittemyer v. City of Portland, 361 Or. 854, 402 P.3d 702 (2017).

11 Everson v. Board of Ed. of Ewing Tp., 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711, 168 A.L.R. 1392 (1947).
The legislative history of the 14th Amendment casts some light on its construction although statements made by the framers of the amendment are not sufficient to resolve a modern-day problem involving racial discrimination Loving v. Virginia, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967).

12 Richardson v. Hare, 381 Mich. 304, 160 N.W.2d 883 (1968); In re Wisser and Gabler, 5 Ohio St. 2d 89, 34 Ohio Op. 2d 217, 214 N.E.2d 92 (1966).

13 Everson v. Board of Ed. of Ewing Tp., 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711, 168 A.L.R. 1392 (1947).

14 Norton v. Lusk, 248 Ala. 110, 26 So. 2d 849 (1946).
As to consideration of provisions of earlier state constitutions, see § 84.

15 New York Public Interest Research Group, Inc. v. Steingut, 40 N.Y.2d 250, 386 N.Y.S.2d 646, 353 N.E.2d 558 (1976); State ex rel. Moore v. Blankenship, 158 W. Va. 939, 217 S.E.2d 232 (1975).

16 Afroyim v. Rusk, 387 U.S. 253, 87 S. Ct. 1660, 18 L. Ed. 2d 757 (1967).

17 U.S. v. Gaudin, 515 U.S. 506, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995).

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IV. Construction of Constitutions

C. Effect of Extrinsic Sources

6. Circumstances Attending Adoption of Provisions; Existing Conditions, Laws, and History

§ 96. Proceedings of conventions and debates considered in construction of constitutional provisions

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 603 to 605

If doubt as to the meaning of a constitutional provision exists after the language has been considered, it is appropriate to consult the drafting history of the provision, including the debates of the delegates to the constitutional convention, and it is also proper to consider constitutional language in light of the history and condition of the times, and the particular problem which the convention sought to address.[1] Thus, in the construction of a constitution, recourse may be had to proceedings in the convention which drafted the instrument.[2] Such proceedings are valuable aids[3] in determining the purpose, intent, and consequent meaning of doubtful provisions.[4] The Constitutional Convention Delegates' intent controls a court's interpretation of a state constitutional provision, and a court primarily discerns the Delegates' intent from the plain meaning of the language used; however, a court defines the Delegates' intent not only from the plain meaning of the language used, but also in light of the historical and surrounding circumstances under which the Delegates drafted the constitution, the nature of the subject matter they faced, and the objective they sought to achieve.[5]

While a court may look to debates, proceedings, and committee reports of a constitutional convention, such evidence does not have any binding force on the court and where necessary to resolve a constitutional ambiguity, a court may also look to the object sought to be accomplished and the evils sought to be remedied.[6] The rule is equally applicable to the proceedings of the convention which drafted the Federal Constitution[7] and the proceedings of state constitutional conventions.[8]

The opinions of the individual members of a convention expressed during the debate, although they are occasionally referred to, are seldom considered as of material value as expressions of the view of the convention as a whole[9] although an early constitutional interpretation may be entitled to great weight in determining the framers' intent especially when the framers later served in one of the branches of government.[10] It is always perilous to derive the meaning of an adopted provision from another provision deleted in the drafting process.[11]

The question in interpreting a constitution is not so much how it was understood by its framers as how it was understood by the people adopting it[12] since the constitution derives its force as a fundamental law, not from the action of the convention but from the people who have ratified and adopted it.[13] Accordingly, debates of a convention, while sometimes illuminating,[14] usually are not considered of controlling weight upon the construction of constitutional provisions[15] and can never be resorted to for the purpose of overruling a plain and unambiguous provision.[16]

Footnotes

1 Blanchard v. Berrios, 2016 IL 120315, 410 Ill. Dec. 923, 72 N.E.3d 309 (Ill. 2016).

2 State v. Schneider, 2008 MT 408, 347 Mont. 215, 197 P.3d 1020 (2008).

3 House Speaker v. Governor, 443 Mich. 560, 506 N.W.2d 190 (1993).

4 Jolicoeur v. Mihaly, 5 Cal. 3d 565, 96 Cal. Rptr. 697, 488 P.2d 1 (1971).

5 Espinoza v. Montana Department of Revenue, 2018 MT 306, 393 Mont. 446, 435 P.3d 603, 363 Ed. Law Rep. 850 (2018), cert. granted, 139 S. Ct. 2777, 204 L. Ed. 2d 1157 (2019).

6 Pray v. Judicial Selection Com'n of State, 75 Haw. 333, 861 P.2d 723 (1993).

7 Missouri Pac. Ry. Co. v. State of Kansas, 248 U.S. 276, 39 S. Ct. 93, 63 L. Ed. 239, 2 A.L.R. 1589 (1919).

8 Ex parte Southern Bell Tel. & Tel. Co., 267 Ala. 139, 99 So. 2d 118 (1957); City of Pawtucket v. Sundlun, 662 A.2d 40, 102 Ed. Law Rep. 235 (R.I. 1995).

9 New Hampshire Mun. Trust Workers' Compensation Fund v. Flynn, 133 N.H. 17, 573 A.2d 439 (1990).

10 Warburton v. Thomas, 136 N.H. 383, 616 A.2d 495 (1992).

11 District of Columbia v. Heller, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008).

12 Succession of Lauga, 624 So. 2d 1156 (La. 1993); Household Finance Corp. v. Shaffner, 356 Mo. 808, 203 S.W.2d 734 (1947).

13 Household Finance Corp. v. Shaffner, 356 Mo. 808, 203 S.W.2d 734 (1947).

14 Regents of University of Michigan v. State, 395 Mich. 52, 235 N.W.2d 1 (1975).

15 Beech Grove Inv. Co. v. Civil Rights Com'n, 380 Mich. 405, 157 N.W.2d 213 (1968); State on Information of Dalton ex rel. Shepley v. Gamble, 365 Mo. 215, 280 S.W.2d 656 (1955).

16 State v. Village of Garden City, 74 Idaho 513, 265 P.2d 328 (1953).
Debates of a constitutional convention generally cannot be considered to vary the otherwise clear and unambiguous meaning of a constitutional provision. Succession of Lauga, 624 So. 2d 1156 (La. 1993).

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IV. Construction of Constitutions

C. Effect of Extrinsic Sources

6. Circumstances Attending Adoption of Provisions; Existing Conditions, Laws, and History

§ 97. The Federalist and other contemporary writings considered in construction of constitutional provisions

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 603 to 606

Over the intervening two centuries since the Federalist Papers were written, thousands of references have been made to these papers in judicial opinions considering constitutional questions,[1] and they have often been accorded considerable weight.[2] The same rule applies to writings about the Federal Constitution's predecessor, the Articles of Confederation.[3]

For the contemporaneous construction, recourse is occasionally had to other unofficial discussions and expositions,[4] such as Thomas Jefferson's "wall of separation" letter to the Danbury Baptists which appears to have been given as much respect as anything said in either the Congress or the ratifying conventions that gave us the First Amendment;[5] and in deciding the proper meaning of the clause authorizing Congress by appropriations "to provide for the general welfare," the Supreme Court looked at great length at the views of both Alexander Hamilton and James Madison.[6]

Footnotes

1 Among the many recent cases that could be cited, see State of Cal. v. U.S., 104 F.3d 1086 (9th Cir. 1997) (on the invasion clause, U.S. Const. Art. IV, § 4); Loving v. U.S., 517 U.S. 748, 116 S. Ct. 1737, 135 L. Ed. 2d 36 (1996) (the Federalist Papers were cited on the question of the separation of powers and the three branches of government); U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 115 S. Ct. 1842, 131 L. Ed. 2d

881 (1995) (Federalist cited on term limits); McIntyre v. Ohio Elections Com'n, 514 U.S. 334, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995) (on the right to distribute unsigned handbills); American Dredging Co. v. Miller, 510 U.S. 443, 114 S. Ct. 981, 127 L. Ed. 2d 285 (1994) (on admiralty jurisdiction and the general maritime law); Koog v. U.S., 79 F.3d 452 (5th Cir. 1996) (on state sovereignty in the federal structure of government); Federal Election Com'n v. NRA Political Victory Fund, 6 F.3d 821 (D.C. Cir. 1993) (on a prohibition against legislative intrusions into other governmental functions); Davis v. Fulton County, Ark., 884 F. Supp. 1245 (E.D. Ark. 1995), aff'd, 90 F.3d 1346 (8th Cir. 1996) (on the protection from private harms as being entrusted to the states); McHugh v. Westpac Banking Corp., 1995 WL 243339 (N.D. Ill. 1995) (on alienage jurisdiction); Keeler v. Mayor & City Council of Cumberland, 928 F. Supp. 591 (D. Md. 1996) (on committing the construction of the United States Constitution exclusively to the courts); U.S. v. Vargas, 885 F. Supp. 504 (S.D. N.Y. 1995) (on criminal sentencing); Canaan Ministries, Inc. v. Town of Cheektowaga, 7 A.D.D. 84 (W.D. N.Y. 1994) (on a central government of limited and defined powers); Dutmer v. City of San Antonio, Tex., 937 F. Supp. 587 (W.D. Tex. 1996) (on term limits); West Virginians For Life, Inc. v. Smith, 919 F. Supp. 954 (S.D. W. Va. 1996) (on the importance of anonymous pamphleteering to freedom of speech and press); Pacific Merchant Shipping Assn. v. Voss, 12 Cal. 4th 503, 48 Cal. Rptr. 2d 582, 907 P.2d 430 (1995) (on the Interstate Commerce Clause); State in Interest of A.C., 631 So. 2d 407 (La. 1994), republished at, 643 So. 2d 719 (La. 1994), on reh'g, 643 So. 2d 743 (La. 1994) (on a government of checks and balances); State v. Haliski, 140 N.J. 1, 656 A.2d 1246 (1995) (on the meaning to be attached to a congressional failure to act); State ex rel. Clark v. Johnson, 1995-NMSC-048, 120 N.M. 562, 904 P.2d 11 (1995) (on the separation-of-powers doctrine); State ex rel. Maurer v. Sheward, 71 Ohio St. 3d 513, 1994-Ohio-496, 644 N.E.2d 369 (1994) (on gubernatorial and presidential pardoning and clemency powers).

2 Loving v. U.S., 517 U.S. 748, 116 S. Ct. 1737, 135 L. Ed. 2d 36 (1996).

No better authority on the purpose of the provisions of the United States Constitution relating to the federal judicial power can be found than the views of Alexander Hamilton expressed in the Federalist. Gresser v. O'Brien, 146 Misc. 909, 263 N.Y.S. 68 (Sup 1933), aff'd, 263 N.Y. 622, 189 N.E. 727 (1934).

3 Oneida Indian Nation of New York v. State of N.Y., 649 F. Supp. 420 (N.D. N.Y. 1986), judgment aff'd, 860 F.2d 1145 (2d Cir. 1988).

As to the historical importance of the Articles of Confederation, see § 7.

4 Washington v. Meachum, 238 Conn. 692, 680 A.2d 262 (1996).

5 Everson v. Board of Ed. of Ewing Tp., 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711, 168 A.L.R. 1392 (1947).

6 U.S. v. Butler, 297 U.S. 1, 56 S. Ct. 312, 80 L. Ed. 477, 102 A.L.R. 914 (1936).

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IV. Construction of Constitutions

D. Construction to Determine Operative Effect

1. As Mandatory or Directory

§ 98. Construction of constitutional provisions as mandatory or directory, generally; presumption

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 619

The courts usually hesitate to declare that a constitutional provision is directory merely since the legislature may tend to disregard provisions which are not said to be mandatory.[1] Accordingly, it is the general rule to regard constitutional provisions as mandatory and not to leave any discretion to the will of a legislature to obey or to disregard them[2] unless it appears from the express terms thereof or by necessary implication from the language used that they are intended to be directory only.[3] The presumption or rule that constitutional provisions are mandatory and prohibitory unless, by express words, they are declared to be otherwise applies to all sections of the state constitution alike and is binding upon all branches of state government.[4]

So strong is the inclination in favor of giving obligatory force to the terms of the organic law that it has even been said that neither by the courts nor by any other department of the government may any provision of the constitution be regarded as merely directory but that each one of its provisions should be treated as imperative and mandatory without reference to the rules distinguishing between directory and mandatory statutes.[5] Nonetheless, if a constitutional provision contemplates the enactment of implementing legislation, the provision should be interpreted as establishing general guidelines for the forthcoming legislation rather than mandatory directives as to its content absent clear language to the contrary.[6] If, by reason of unique local conditions, a mandatory constitutional provision serves to confuse rather than to solve the problem with which it is concerned, the consequences must be accepted as inherent in government by law instead of government by edict.[7]

Footnotes

1 J. J. Newman Lumber Co. v. Robertson, 131 Miss. 739, 95 So. 244 (1923); Scopes v. State, 154 Tenn. 105, 289 S.W. 363, 53 A.L.R. 821 (1927).
As to the distinction between the mandatory or directory character of a constitutional provision and its nature as self-executing or not self-executing, generally, see § 101.

2 StopAquila.org v. City of Peculiar, 208 S.W.3d 895 (Mo. 2006).
Essential provisions of a constitution are to be regarded as mandatory. Floridians Against Expanded Gambling v. Floridians for a Level Playing Field, 945 So. 2d 553 (Fla. 1st DCA 2006).

3 In re Advisory Opinion to Governor, 510 A.2d 941 (R.I. 1986).
As to the effect of particular constitutional language, see §§ 99, 100.

4 Unger v. Superior Court, 102 Cal. App. 3d 681, 162 Cal. Rptr. 611 (1st Dist. 1980) (disapproved of on other grounds by, Unger v. Superior Court, 37 Cal. 3d 612, 209 Cal. Rptr. 474, 692 P.2d 238 (1984)).

5 State, on inf. of Dalton v. Dearing, 364 Mo. 475, 263 S.W.2d 381 (1954).

6 Pennsylvania State Troopers Ass'n v. Com., 145 Pa. Commw. 291, 603 A.2d 253 (1992), order aff'd, 533 Pa. 111, 619 A.2d 1355 (1993).

7 Tishman v. Sprague, 293 N.Y. 42, 55 N.E.2d 858 (1944).

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IV. Construction of Constitutions

D. Construction to Determine Operative Effect

1. As Mandatory or Directory

§ 99. Particular constitutional language construed

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West's Key Number Digest

West's Key Number Digest, Constitutional Law 619

Prohibitory language stated in a constitution is nearly always construed as mandatory.[1] If directions are given respecting the time and mode of proceeding in which a power should be exercised, there is at least a strong presumption that it was designed to be exercised in that time and mode only.[2] Constitutional provisions imposing duties upon the governor[3] and the legislature[4] are mandatory. However, a constitutional article providing that all laws are to be made "for the good of the whole; and the burden of the state ought to be fairly distributed among its citizens" presents no constitutional restraint upon the legislative power of the legislature because it was addressed to the legislature by way of advice rather than as a command.[5]

A specific constitutional provision that its provisions are mandatory and prohibitory unless by express words declared to be otherwise will, of course, be given effect.[6] Such a declaration applies to all sections of the constitution alike[7] and is binding on every department of the state government, whether legislative, executive, or judicial.[8]

Footnotes

1 State v. Haun, 61 Kan. 146, 59 P. 340 (1899); Board of Com'rs of Wilkes County v. Call, 123 N.C. 308, 31 S.E. 481 (1898); State v. Yardley, 95 Tenn. 546, 32 S.W. 481 (1895).

2 State, on inf. of Dalton v. Dearing, 364 Mo. 475, 263 S.W.2d 381 (1954); Walker v. Baker, 145 Tex. 121, 196 S.W.2d 324 (1946).

3 Capito v. Topping, 65 W. Va. 587, 64 S.E. 845 (1909) (overruled in part on other grounds by, Charleston Nat. Bank v. Fox, 119 W. Va. 438, 194 S.E. 4 (1937)).

4 Brewer v. Gray, 86 So. 2d 799 (Fla. 1956).

As to constitutional provisions using the word "shall," see § 100.

5 In re Advisory Opinion to Governor, 510 A.2d 941 (R.I. 1986).

6 People v. Jordan, 172 Cal. 391, 156 P. 451 (1916); Ford Motor Co. v. Baker, 71 N.D. 298, 300 N.W. 435 (1941).

7 People by Webb ex rel. Conklin v. City of San Buenaven Tura, 213 Cal. 637, 3 P.2d 3 (1931) (overruled on other grounds by, Costa v. Superior Court, 37 Cal. 4th 986, 39 Cal. Rptr. 3d 470, 128 P.3d 675 (2006)).

8 Allen v. State Bd. of Equalization, 43 Cal. App. 2d 90, 110 P.2d 73 (2d Dist. 1941).

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§ 100. Particular constitutional language construed—"Shall" or "may"

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When interpreting constitution provisions, the word "shall" is presumed to have a mandatory meaning.[1] The word "shall" should be afforded a mandatory connotation, and when used in constitutions and statutes, it leaves no way open for the substitution of discretion.[2] On the other hand, the word "shall" may receive a permissive interpretation when necessary to carry out the true intent of the provision in which that word is found.[3] In other words, in the context of interpreting statutes and constitutional provisions, the word "shall" is considered presumptively mandatory unless something in the character of the provision being construed requires that it be considered differently.[4] Thus, use of the word "shall" is not always conclusive.[5]

For purposes of constitutional construction, the word "may" ordinarily signifies permission and generally means that the action spoken of is optional and discretionary.[6] Accordingly, the word "may" should not be construed as "shall" in a constitutional provision unless from the whole context the purpose plainly appears to be mandatory[7] although occasionally, the word "may" has been interpreted to mean "shall" or "must."[8]

Footnotes

1 Patterson Recall Committee, Inc. v. Patterson, 209 P.3d 1210 (Colo. App. 2009).

2 State ex rel. Workman v. Carmichael, 241 W. Va. 105, 819 S.E.2d 251 (2018), cert. denied, 140 S. Ct. 98, 205 L. Ed. 2d 24 (2019) and cert. denied, 140 S. Ct. 106, 205 L. Ed. 2d 24 (2019).

3 Northwestern Bell Telephone Co. v. Wentz, 103 N.W.2d 245 (N.D. 1960).

4 Opinion of Justices, 260 So. 3d 17 (Ala. 2018).

5 Canyon Public Service Dist. v. Tasa Coal Co., 156 W. Va. 606, 195 S.E.2d 647 (1973).

6 State v. Hill, 314 S.C. 330, 444 S.E.2d 255 (1994).

7 State ex rel. Greaves v. Henry, 87 Miss. 125, 40 So. 152 (1906).

8 Robison v. Payne, 20 Cal. App. 2d 103, 66 P.2d 710 (3d Dist. 1937).

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